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BEFORE THE ARIZONA CORPORATION COMMISSION

DOUG LITTLE CHAIRMAN	BOB BURNS COMMISSIONER	TOM FORESE COMMISSIONER
BOB STUMP COMMISSIONER	ANDY TOBIN COMMISSIONER	

REGARDING COMMISSION AND COMMISSIONERS' SUBPOENA POWERS	**DOCKET NO. AU-00000A-15-0309** **RESPONSE TO LETTERS BY DONALD E. BRANDT AS APS & PINNACLE WEST, MEMORANDUM BY MARY O'GRADY, AND MISCELLANEOUS OTHER SUBMISSIONS**

INTRODUCTION

Renz Jennings and William Mundell (the "Interested Parties") provide the following information as former Commissioners of the Arizona Corporation Commission (the "Commission"). They respond to provide support that demonstrates, beyond question, that the Commission and each of its Commissioners possess the authority to demand disclosure, using subpoenas to require such disclosure if necessary, of the spending, if any, made by APS and/or

PinWest to influence the outcome of the 2014 (and any future) races for Commission seats. In supplying this support, the Interested Parties specifically respond to (1) two letters submitted by Donald E. Brandt on behalf of both Pinnacle West Capital Corporation ("PinWest") and its wholly-owned subsidiary and affiliated company, Arizona Public Service Company ("APS"), and dated, respectively, October 23, 2015 (the "PinWest Letter") and December 29, 2015 (the "APS Letter"); and (2) the Memorandum authored by Mary O'Grady and dated September 28, 2015, and submitted under cover of a letter by Gary M. Yaquinto, President and CEO of the Arizona Investment Council (the "AIC") and dated October 2, 2015 (the "AIC Memo").

Each of the PinWest Letter, the APS Letter and the AIC Memo repeatedly raise the argument that the Interested Parties and others who similarly seek disclosure of campaign expenditures by regulated utilities and their affiliates in the prior and future Commission races want to muffle, mute or halt the First Amendment free speech rights of regulated utilities and/or their affiliated companies. *See* PinWest Letter at 1, APS Letter at 1, and AIC Memo at 3-4. *The generic complaint—that the Interested Parties seek to halt speech even of APS and/or PinWest is false and a strawman argumen*t.

The Interested Parties acknowledge that both of these large corporations have First Amendment rights to participate in the political process, including making campaign contributions. But they do not have the unfettered right to do so anonymously. The Interested Parties, like so many Arizona voters and ratepayers, only seek transparency through disclosure. APS and PinWest may spend as they like in such campaigns, within the bounds of Arizona and federal law, but they may not continue to do so behind a veil of non-profit shell corporations and thinly sponsored "associations." Such secrecy is not mandated or protected by Arizona's Constitution, Arizona statutes or the Constitution and laws of the United States.

Rather, the United States Supreme Court has upheld disclosure obligations, saying:

> "The *First Amendment* protects political speech; and *disclosure* permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

Citizens United v. FEC, 558 U.S. 310, 369 (2010) (emphasis added).

APS, PinWest and AIC then complain that seeking disclosure from APS and/or PinWest impermissibly targets them or singles them out. APS Letter at 1, PinWest Letter at 1, AIC Memo at 4. APS and PinWest are solely responsible for having now, perhaps alone, to face the disinfecting shine of sunlight on their corporate expenditures to influence, directly or indirectly, the election of their own regulators at the Commission. Over more than a year, APS and PinWest chose to play the cheeky game of refusing to confirm or deny whether they were making such expenditures.[1] They point to others' expenditures during the 2014 election cycle for Commission seats as proof of their right to maintain silence and refuse to disclose. AIC at 2, 3-4, APS Letter at 2-3. The rich irony of that defense comes from—and collapses because—the facts of the identity of the contributors WAS disclosed, which is why APS and PinWest point to the expenditures in the first place. So APS and PinWest have remained mute.

Or at least did so until the 2015 PinWest Annual Shareholders Meeting. At that meeting, the APS CEO and the PinWest Chairman—in the form of one person—Donald E. Brandt, declared that these companies had and would continue to exercise their First Amendment rights to speak in political campaigns. *See* Exhibit 23 to the Interested Parties' Application for Rehearing of Decision No. 75251 On the Ground That Commissioners Tom Forese and Doug Little Should Have Recused Themselves or Been Disqualified From Considering the Matter Before the Commission dated 9/17/2015 in docket E-01345A-13-0248 ("Caperton Brief"). Yet, and again, nobody is denying that APS and PinWest currently may claim a First Amendment right to speak in Commission elections, even to the point of spending millions of dollars to elect their own regulators. Rather, the Interested Parties merely point out that, in the interest of dispelling the appearance of impropriety, the appearance of corruption and possible *quid pro quo* arrangements, and to provide voters and ratepayers the opportunity now and in the future to monitor

[1] PinWest is a publicly traded corporation, with its stock traded on the New York Stock Exchange. It therefore is subject to Arizona and federal securities laws. As a result, PinWest's public statements are subject to the laws and rules set forth in and promulgated under the Securities Act of 1933 and the Securities Exchange Act of 1934. PinWest is, accordingly, obligated to comply with Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, which states that PinWest may not make misstatements of material fact regarding its activities. It appears that, if PinWest is the source of significant contributions to Arizona Free Enterprise Club and/or Save Our Future Now, PinWest cannot deny having made such contributions because to do so would put the company at risk for such a violation. If neither PinWest nor APS (or their respective officers, directors or significant shareholders) made the contributions at issue, it would seem that nothing would prevent them from stating that fact.

Commissioners' behavior in the light of the facts of such spending, the Commission and each Commissioner is empowered to tear away the mask of anonymity in such spending.

IF expenditures were made, the public should know it. If expenditures were not made, the public should know that too. In the absence of such disclosures, the Commission, each Commissioner, and all the voters and ratepayers of Arizona are left to speculate about whether Commissioners knew, now know or in the future may discover they were elected through contributions by APS or PinWest, corporations they are to regulate. True or false, regardless, the current status of uncertainty establishes exactly the environment that First Amendment case law seeks to prevent by supporting, not denying, disclosure: The continuation of the appearance of impropriety, the appearance of corruption, possible *quid pro quo* arrangements, and the inability for Commissioners to address these issues and whether or when they may be required to disclose conflicts of interest under Supreme Court case law.

Nothing in federal or state law precludes the Commission or any one of its Commissioners from issuing AND enforcing a subpoena to require APS, PinWest, or any and every other similarly situated corporation, from disclosing contributions made to influence, directly or indirectly, the outcome of the Commission races, whether for 2014 or into the future. None. Not any Arizona statutes, not any Arizona case law, no provision of the Arizona Constitution, not the First Amendment, and certainly not any U.S. Supreme Court decision. To the contrary, all of these sources of law support the clear and compelling (let alone sufficiently important) interest of the Commission to seek such information for the directly related concern that the Commission and its Commissioners carry out their Constitutionally mandated mission to regulate corporations and thereby protect the interests of Arizona's citizens in a manner that is free of bias, free of the appearance of impropriety, free of corruption, and avoid engaging in *quid pro quo* behavior. What proof is available to support this conclusion? The following Memorandum. What proof is available to demonstrate that the opponents to transparency are wrong? That they cannot cite any legal precedence to support their conclusion.

A. NOBODY SEEKS TO CURB APS'S RIGHT TO SPEAK.

APS and PinWest and their allies repeatedly raise the First Amendment as their shield against transparency. In his PinWest Letter, Mr. Brandt states that asking APS and PinWest not to spend money in the upcoming Commission campaigns requires APS "to relinquish one means of expression of [its] right" to " avail[] itself of all lawful means to make its views on issues important to customers, employees and shareholders known...." PinWest Letter at 1. Mr. Brandt claims that the request that PinWest and APS "refrain from exercising their First Amendment rights is particularly problematic." PinWest Letter at 2. The Interested Parties do NOT dispute these claims.

In fact, even the Commission seems to concede this point as made by Commissioner Burns in his letter to this docket dated November 30, 2015 ("Burns Letter"). Commissioner Burns wrote:

> I recognize that both APS and Pinnacle West have a First Amendment right to participate in elections, and it is not my intention to interfere with the exercise of those rights. Intuitively, I understand that you have an interest in supporting candidates who may agree with your views. However, in my opinion, your support for any particular candidate should be open and transparent.

Burns Letter at 1. Mr. Burns repeated this theme in the second paragraph of his most recent Notice of Investigation to APS dated January 28, 2016, and filed in this docket (the "Notice of Investigation"). To continue to raise such claims—that proponents of transparency seek to curb the exercise of protected First Amendment speech—after the point has been conceded demonstrates a desire to hide what really is at stake: Transparency. Such obfuscation is shown when Mr. Brandt claimed that even to require APS and/or PinWest merely to disclose the "political contributions that APS or its affiliates may have made out of shareholder profits would go beyond what is required....and would impinge on APS's First Amendment rights." APS Letter at 1.

The effort to claim interference with APS's and PinWest's First Amendment rights was also made by AIC. In the AIC Memo, it was claimed that any subpoena requiring disclosure of spending in Commission campaigns, would be a "subpoena targeting [APS] with retroactive campaign finance disclosure requirements" which "implicates fundamental First Amendment rights." AIC Memo at 3. That Memorandum concludes by claiming, incorrectly, that "the

Commission's use of its compulsory investigatory power.....has no support in the First Amendment." *Id* at 7.

To be clear, the Interested Parties do not, nor does any Commissioner yet on record to the Interested Parties' knowledge, advocate that APS and/or PinWest are not free to expend money on political campaigns, even in Commission races, at least as long as such money is not treated as an operating expense that is recoverable in utility rates. To the contrary, the Interested Parties, as with many other like-minded citizens, only argue that such political spending by a regulated utility and its affiliates should and, if required by the Commission or any Commissioner, *must* be disclosed.

B. COMMISSION SUBPOENAS REQUIRING CAMPAIGN SPENDING DISCLOSURE DO NOT CURB FIRST AMENDMENT SPEECH.

1. The Commission And Each Commissioner Have the Power to Require Disclosure from APS *and* PinWest.

APS or PinWest continue to argue that the Commission does not have the power to require disclosure of spending by APS and PinWest. See PinWest Letter and APS Letter. It is now well established in case law and in this and several other dockets that the Commission and each Commissioner have the power and authority to demand disclosure of spending by APS and its parent company, PinWest. *See* Ariz. Const. Art. 15, § 4; A.R.S. § 40-241(A).[2] Further, it is now well established law, through a case involving APS and its former parent company, AZP Group, that PinWest is subject to that same power to require disclosure as APS. Yes, PinWest is a publicly-traded corporation that is subject to disclosure obligations in its own right. *See* Ariz. Const. Art.15, § 4. Moreover, PinWest is subject to the same, and arguably broader, disclosure obligations than even APS because it is the parent and affiliated company of a public service corporation, APS. This result has been clearly and long-ago established in *Arizona Public Service Co. v. Arizona Corp. Com'n*, 157 Ariz. 532, 536,760 P.2d 532, 536 (1988) (demonstrating that publicly traded parent company is subject to Commission authority and disclosure rules). Moreover, under this case, the Commission's disclosure authority applies *even to matters that are*

[2] Retired Chief Justice Zlacket clearly laid out the authority that establishes the Commission's (or a Commissioner's) power to subpoena the records of APS and PinWest. *See* Zlacket letter 9/17/2015.

not otherwise regulated activities, including transactions with publicly traded entities. *Id.* at 533, 536, and at 533, 536. This outcome was reached because APS's parent company is a publicly traded entity that wholly owns APS, which is an affiliated, public service corporation and a regulated monopoly utility. *Id.* Specifically, while currently the Notice of Investigation only appears to seek information directly from APS, nothing would preclude the expansion of that Notice of Investigation directly to require the same, similar or additional disclosures of PinWest as those sought in the Notice of Investigation. *Id.*

2. The First Amendment Supports Disclosure Here.

As demonstrated above, the Arizona Constitution, Arizona statutes and Arizona case law directly involving APS establish the Commission's and each Commissioner's authority to demand disclosure of *any* information from APS and PinWest, including information from PinWest regarding otherwise unregulated matters. Because of this legal construct, APS, PinWest and its ally, AIC, try to argue, as they apparently now must, that APS and/or PinWest spending on campaigns, and specifically spending for and against the campaigns of Commission candidates, somehow must be treated differently and should not be subject to the clear authority the Commission and each Commissioner has over all other APS and PinWest information. *See* PinWest Letter, APS Letter and AIC Memo. To make their claims, these advocates for dark money and hidden spending claim, as noted above, that the First Amendment precludes enforcement of disclosure. Such a claim is not supported by any Constitutional authority, nor by any state or federal statutes, nor by any Arizona or U.S. Supreme Court holding.

a. Disclosure Does NOT "Single Out" APS or PinWest: They Created The Challenge & Disclosure Provides the Solution.

The advocates for darkness claim that requiring disclosure of campaign contributions that, directly and indirectly, influenced the outcome of the 2014 Commission elections or those in the future would "single out" APS or PinWest would be to act "arbitrarily and unlawfully out of a desire to harass and intimidate a company rather than 'gather appropriate information.'" AIC Memo at 3.

First, the case cited for that proposition has been demonstrated elsewhere to be both inapplicable here and alarmingly overstated in its purported holding. Zlacket Letter to Docket 9/17/2015 at 1-2. Accordingly, that analysis will not be repeated here.

Second, PinWest also is a parent and affiliated company that wholly owns APS. Both APS and PinWest long have been aware that the same investigative authority that applies to APS also applies to PinWest. *Arizona Public Service Co.* 157 Ariz. at 536, 760 P.2d at 536. This is as it MUST be. To allow PinWest to hide expenditures and activities that, if undertaken by APS, would otherwise be exposed to the disinfectant of sunlight would, again, turn the purpose of the formation of the Commission through the State's Constitution on its head. This power to require disclosure applies even to matters that would not be subject to Commission regulation because such activities impact regulated activities. *Id* at 535-536.

Instead, the disclosure sought concerns the avoidance of the appearance of impropriety and corruption, reducing the chance of behavior that would facilitate a *quid pro quo*, and provides the electorate now and in the future with information that will inform their understanding and decisions regarding candidates for Commission. While the AIC asserts that "backward-looking subpoenas demanding information about past political speech would have little deterrence value," [AIC Memo at 5], information even about the 2014 election would assure that the public and all interested parties may know whether contributions from a public service corporation or its parent affiliated corporation helped select their regulators. Such disclosure would help the elected Commissioners whose election may have been affected to disclose concerns, declare conflicts and otherwise attend to the uncertainty and taint that now only transparency will address. And it is for such reasons that the U.S. Supreme Court already has declared that requiring such disclosure does not offend the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976) (noting with approval Justice Brandeis' advice that "'[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.'").

b. Disclosure Is Encouraged By the First Amendment & *Citizens United* in This Case.

The advocates for darkness cite *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) as their bulwark against disclosure, repeatedly claiming, as already noted, that the First Amendment protects APS and PinWest from disclosure. *See* PinWest Letter at 2; AIC Memo at 3. These attempts to recast *Citizens United* as preventing disclosure rather than encouraging it fails.

In *Citizens United*, the Court considered, essentially, whether a corporation's contributions could be limited in a fashion different from that of individual contributors. *Citizens United*, at 311-312. Contrary to the AIC Memo's effort to claim that requiring disclosure of corporate campaign spending is *not* permitted by Citizens United [AIC Memo at 3], instead the Supreme Court made it clear that, as the likeliest protection of abuse arising from such spending, disclosure is allowed, if not encouraged, as long as there is a "substantial relation" between the disclosure requirement and a "sufficiently important" government interest. *Citizens United*, 558 U.S. at 365. The Court's ruling states: "[T]he public has an interest in knowing who is speaking about a candidate shortly before an election....the information interest alone is sufficient" to justify disclosure. *Id.* at 369.

In this case, the interest of the Commissioners and the public at large in knowing the identity of the speaker that spent $3.2 million dollars to elect two Corporation Commissioners, and at least whether one of those speakers was APS and/or PinWest, is more than sufficiently important. Whether APS and/or PinWest were involved in selecting the regulators who are now to set their rates for their captive, monopoly customers, allow or deny the increase by millions of dollars through in the Lost Fixed Cost Recovery mechanism now at stake in a Commission docket, and other crucial issues (including APS's upcoming rate case), absolutely meets the requirements to mandate disclosure under the First Amendment. These issues concern the appearance of impropriety and corruption, whether there may be an offer or demand for a *quid pro quo* exchange, and whether one or more Commissioners must or should recuse himself under the standards established in *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009). Each and all of these, among other issues, is sufficient to uphold the Commission's or any Commissioner's

exercise of the Constitutionally-mandated subpoena power to require disclosure from both APS and PinWest. *See, e.g. Buckley v. Valeo*, 424 U.S. at 65. As the Court established in Buckley:

> [Disclosure requirements] deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.

Buckley, 424 U.S. at 65.

c. Campaign Finance Laws Do Not Limit the Commission's Constitutional Authority to Investigate in This Case.

The irony is that the AIC Memo repeatedly brandishes the idea that requiring disclosure now of APS and PinWest regarding expenditures made for the 2014 election of Commissioners is an improper, retroactive application of unestablished campaign finance laws outside the scope of the Commission's investigative authority. AIC Memo at 5-7. Nonsense.

First, essentially what these entities advocate is that, by the Arizona Legislature enacting campaign finance laws, the Constitution of the State of Arizona, and the authority granted to the Commission and each Commissioner to investigate regulated monopoly utilities that are public service corporations somehow has been restricted. The state statutes governing campaign finance laws cannot and do not alter the scope of the Arizona Constitution. *See, e.g., Arizona Corp. Comm'n v. Superior Court,* 105 Ariz. 56, 62, 459 P.2d 489, 495 (Ariz. 1969) (noting that "power vested in the Commission by the Constitution cannot be limited by statute").

Second, as the language from *Buckley* makes clear, the requirement of disclosure and the resulting "exposure may discourage those who would use money for improper purposes either *before* or *after* the election." *Id.* [emphasis added]. That the disclosure may happen now, after the election, does not make the information to address the appearance of impropriety, the "special favors" that may be impressed upon one or more Commissioners, and similar issues any less relevant. In fact, if APS, PinWest and AIC are successful in cowing the Commission and its Commissioners from seeking disclosure now, the taint from the last election remains, the appearance of impropriety festers, and the question of who is "'in the pocket' of so-called moneyed

interests" remains. *Citizens United*, 558 U.S. at 370, quoting *McConnell v. Federal Election Commission*, 540 U.S. 93, 259 (Scalia, J. concurring in part and dissenting in part). Worse, the failure to demand and enforce disclosure on this issue now, in the first case of its kind in the Commission's more than 100-year history (see Caperton Brief), only enhances the likelihood that the crush of hidden funding increases in upcoming Commission elections, with an even greater prospect that regulated utilities may be tempted or actually seek to—and do—*secretly* select their own regulators. This is an impermissible result for the integrity of the Commission, its Commissioners, and fails to address the extraordinary taint of impropriety and corruption that such campaign involvement brings to the State, the Commission and the many citizens and ratepayers who will be subject to that outcome.

Third, as noted above, requiring disclosure of campaign contributions that directly or indirectly influenced the Commission elections may, indeed, concern issues of campaign finance law. But using that overlap as a basis to deny the Commission or its individual Commissioners the authority to seek disclosure proves too much. That overlap of law does not mean that the purpose of the investigation or the disclosure sought is either outside the scope of the Commission's authority or improperly invading the authority of another branch, such as the Arizona Legislature's authority to regulate campaign finance laws. Just as the Commission exercises administrative functions otherwise performed by a governor, and legislative functions otherwise performed by a legislature, and judicial functions otherwise performed by courts does not prevent the Commission and its members from such exercise. To the contrary, such overlap and, as AIC would have it viewed, "impermissible expansion" of Commission investigative authority instead is *mandated* by the Arizona Constitution. *See, e.g.* Ariz. Const. Art. XV § 4.

So it is here. The Commission is subject to specific Arizona Constitutional mandates to regulate public service corporations and the monopoly businesses that those corporations are granted by the State to operate. It is only through the Commission's existence and authority to regulate such monopoly companies that the drafters of the Arizona Constitution believed Arizonans, as citizens and ratepayers, would be protected. Now to attempt to deny the Commission's authority to investigate issues that attack the very core of the Commission's

existence and ability to perform its function—in regulating these monopoly companies—is to turn the Arizona Constitution on its head.

Fourth, opponents to disclosure claim that, perhaps APS may be subject to the requirement of disclosure, but it would be an overreach to demand such disclosure of PinWest. As noted above, APS clearly is subject to the subpoena powers of the Commission, and each Commissioner, as a public service corporation that has been granted a monopoly to provide electricity to its captive customers. Ariz.Const. Art. XV § 4. But PinWest equally is subject to that subpoena power, and for two reasons. PinWest is a publicly traded company, subject in its own right to the Commission's and each Commissioner's subpoena power.

More recently, none other than the current Attorney General made clear that, if a rule of interpretation of an Arizona statute applies to one corporation, that same rule must be adopted and applied to all that corporation's affiliates. See, Petition for Special Action, State of Arizona ex rel. Mark Brnovich v Susan Bitter Smith, Case No. CV-15-0356-SA (2015). If such a rule is to be applied to Commissioners, no less a rule should be applied to the corporations that the Commission regulates. And certainly that must be the case here, and unlike in the case filed by the Attorney General against former Commissioner Bitter Smith, the corporations at issue—PinWest—is the sole owner of a utility directly regulated by the Commission, APS: The case brought by the Attorney General against Commissioner Bitter Smith demonstrates that, at least according to the Attorney General, information disclosure that applies to APS must apply to PinWest by virtue of the unity of existence of the two corporations.

Further, even the APS and PinWest officials often intermingle their activities. When Donald E. Brandt meets with Commissioners or appears before the Commission, which Donald E. Brandt is present? The Donald E. Brandt who is the Chief Executive Officer of APS or the Donald E. Brandt who is the Chairman, President and CEO of PinWest? Even in this docket, in the exchange of letters on a single issue, Mr. Brandt couldn't decide which company he was representing. In his first letter to this docket in response to a request that regulated utilities and their affiliates NOT participate in the upcoming Commission elections, Mr. Brandt used PinWest letterhead, apparently responding to this question as the Chairman of PinWest. See PinWest

Letter. Then, when asked a series of follow-up questions by Commissioner Burns (see Burns Letter) to Mr. Brandt's response in the PinWest Letter, Mr. Brandt then responded using APS Letterhead, apparently responding to the follow-up questions posed to PinWest as the Chief Executive Officer of APS. Confusing, perhaps, but clarifying. Even APS and PinWest confound the issue and demonstrate that disclosure appropriate for and from APS also is appropriate for and from PinWest.

CONCLUSION

It is the Commission, and each Commissioner, not APS, not PinWest, and not the captive interest group the AIC, that must decide whether to use the power granted by the Arizona Constitution in Article 15, Section 4 to demand what Arizona citizens and APS ratepayers deserve to know: What did APS and/or its parent and affiliated company PinWest, spend through Arizona Free Enterprise Club and Save Our Future Now to influence the outcome of the 2014 Arizona Corporation Commission races?

Without proof to the contrary, which proof is uniquely in the hands of APS and PinWest, the objective evidence clearly indicates the involvement of APS and PinWest was so substantial that it reached levels that exceed the level tolerated by the Due Process Clause under the standards established in *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009). The view that this conclusion is objectively determined comes not "allegations about rumor" as APS and/or PinWest and AIC claim: It is instead supported by the official statements by APS and Pinnacle West spokesmen and the very CEO of the organizations in his remarks to Pinnacle West shareholders. It does not matter whether that intentionally-created conclusion has been cemented in Arizonans' minds by APS and PinWest correctly or in the hope, falsely, of generating influence in Commissioners' minds. The result is the same: The creation of the appearance of impropriety and corruption through the possibility of *quid pro quo* arrangements, among other serious matters of interest to Arizona voters and ratepayers.

Some confuse the issue of whether actual knowledge of the source of the expenditures is required *before* the investigation into the issue should proceed. It may be true that the general public and even the entire press corps may not know that APS and/or PinWest made some or all

of the $3.2 million in expenditures credited to Arizona Free Enterprise Club and Save Our Future Now. That is not the point. The reason that the investigation is essential is that, notwithstanding personal declarations of ignorance by one person or another, or by one Commissioner or another, the need for the investigation into this unique set of circumstances is driven by the only significant violation of the 100-year history of the understanding that regulated utilities should not participate in Arizona Commission elections. [3] It is driven by the recognition that even if Commission candidates did not know during the election, or do not know now, they may come to discover the truth at some moment, and only they and their consciences will be the determiner of the consequences. That does not serve the point of the First Amendment's established structure that disclosure is appropriate and even encouraged to avoid the appearance of impropriety (which currently exists), to avoid corruption (the prospect of which currently exists), the opportunity for *quid pro quo* arrangements (the possibility of which continues to exists), and the opportunity to assure the integrity of the Commission and each Commissioner is intact for the protection of the interests of Arizona's voters and ratepayers (the prospect for which is severely in question).[4]

The Commission should require disclosure now in large part because, the certainty that such expenditures will be required to be disclosed may be the most effective prophylactic to such spending in the future. With this past election as the only significant violation of the 100-year history of the understanding that regulated utilities should not participate in Arizona Commission

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[3] The phrase "unique set of circumstances" is not loosely used here. As demonstrated by the controversy that arose in the 2012 election cycle in which three ACC seats were contested, the expenditure of independent monies that are or may be linked, even indirectly, to regulated utilities was viewed as highly unusual. In the 2012 Commission races, the Arizona Chamber of Commerce and Industry contributed $7,500 to election campaigns of the three successful Commission candidates. [Caperton Brief, Exhibit 15] Significant concern arose from that contribution when it was revealed that two of the donors to the Arizona Chamber's campaign fund were two utilities regulated by the Commission: APS and Southwest Gas Corporation. One news article describing the concerns raised by such "indirect" spending by regulated utilities is found in the Caperton Brief, Exhibit 15. Commissioner Stump was reported to have said utilities should stay out of political races involving regulators—"'I agree with the policy not to get involved in (commission) races.'" [*Id.* at ACC_AR0307]

[4] Indeed, the very fact that APS has new dockets open and will be pursuing its rate case this year still presents a viable question of whether Commissioners Forese and Little should sit in judgment on APS matters under the guidelines of *Caperton*. The continuing appearance of possible impropriety is the very issue *Caperton* addresses from a due process perspective and fuels the substantial interest the Commission has (or certainly should have) in examining what happened in the 2014 Commission elections. Moreover, the disinfectant of sunlight on the past election may well provide some guidance for all going forward—that is, while APS and PinWest can exercise their First Amendment rights to participate in the political process, they can (and should) expect that they cannot do so in the secrecy provided by the darkness.

elections, swift action now requiring disclosure may be the best hope for Arizona voters and rate payers to be free of monopoly influence in the selection of the Constitutionally-created Commission seats.

The Interested Parties, former Commissioners themselves, stand before the Commission for the proposition that, for more than 100 years, regulated utilities properly have avoided participating, or even giving the appearance of participating, in the elections to select their own regulators. The Commission was established in Arizona's Constitution to provide protection of Arizona rate payers from the immense power granted to monopolies that operate in a protected business environment. Only with revelation in 2013 of inadvertent expenditures in the Commission races, followed by the unprecedented flood of "independent" funds into the 2014 Commission races have Arizona rate payers faced the realization that the monopolies the Commission is to regulate would now fund efforts to elect the Commissioners who are to oversee those monopolies. Because the Commissioners are to provide independent, quasi-judicial service to Arizona, due process requires not, as fear mongers seem to suggest, but as the law supports: Demand for full disclosure by both APS and PinWest of all contributions and expenditures that, directly or indirectly, were sought to or did influence the 2014 election for Commissioners. If polite requests are insufficient to generate legally appropriate and verifiable responses demonstrating complete transparency, by APS and PinWest, then the Commission and each Commissioner may and should rely on their constitutionally-provided subpoena power to compel the disclosure of both APS and PinWest. U.S. and Arizona law support that effort and Arizona voters and ratepayers deserve no less.

RESPECTFULLY SUBMITTED this 29th day of January, 2016.

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